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IN THE

Supreme Court of the United States

No. 916—October Term, 1957

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

KRISEL, BECK & TAYLOR
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The substance of the opposition to the petition is the contention that respondent was not duty bound to attempt salvage if that involved transporting the wheat for drying and sale at New York City. Respondent mistakenly argues that as a matter of law, it was entitled to recover the full value of the wheat at the time and place of the sinking, and that the Courts below applied the correct standard of review. None of these contentions has merit.

POINT I

Respondent was duty bound to salvage the wheat, if, as the Commissioner found, salvage was commercially feasible.

Respondent, as did the Courts below, refers to the rule of damages applied in *The Scotland*, 105 U. S. 24 and in *Smith* v. *Condry*, 42 U. S. 28, namely, that the measure of damages for the loss of a vessel or of her cargo is their value at the time and place of injury, and does not include the loss of an anticipated profit, realization of which had been prevented by the disaster. We have no quarrel with this rule. It does not follow, however, as respondent argues that the vessel owner or cargo is not bound to mitigate the damages if that is commercially feasible, and that this obligation may require undertaking salvage, including disposal of the salvage product, at a place other than where the sinking occurred. This is the teaching of *The Baltimore*, 75 U. S. (8 Wall.) 377.

Nor is it true that the duty to prevent avoidable aggravation of damage is less when, as here, a perishable commodity is involved. This Court, in *The Niagara*, 62 U. S. 7, emphasizes that the perishable nature of the cargo only enhanced the carrying vessel's duty to act promptly to avert loss. In so holding, the Court observed that the ship is burdened by that duty so long as "it appears that the goods have not perished with the wreck and certainly not where, as in this case, the vessel is only stranded on the beach." 62 U. S. 7, 16 L. Ed. 41, 47.

Many cases demonstrate the measures that must be taken by a prudent cargo owner or bailee of damaged

cargo in order to minimize a loss. See, for example: *The El Monte* (5 Cir. 1918), 252 F. 59, 64-65; *cert. den.* 248 U. S. 593, in which the action taken to minimize a loss to wheat "damaged by salt water" included "unloading, drying, reconditioning, and reloading" (at p. 64) and thereafter transporting and selling the wheat in Rotterdam, where it could be sold for a higher price than in Galveston, where the damage occurred; *The Umbria*, 59 F. 489, 490, in which cargo recovered from a sunken vessel was "sold at the City of New York after various expenses were incurred in putting it into a proper condition for sale"; *Grace* v. *Charleston*, 193 F. 2d 539, in which cotton damaged by "exposure to salt water" (at p. 542), was recovered "while floating in the water" and "from the beach upon which it had been washed" (at p. 544), so that it became necessary "to rehandle the cotton" (at p. 544); within less than a week the cotton was inspected, identified, weighed and fumigated, passed through Customs, and delivered to the railroad for transportation from North Charleston to Charleston; *Weirton* v. *Isbrandtsen*, 126 F. 2d 593 (C. C. A. 2), in which the consignee of tin plates "reconditioned them as far as possible," though "the reconditioning left the plates dull and imperfect in appearance" (at p. 593); *The Florida*, 61 F. 2d 55, where a cargo of cement damaged by water was reconditioned and held in storage for a long period, in order to await an opportunity to sell it at a higher price. See also *United States* v. *Los Angeles Soap Co.*, 83 F. 2d 875, 887-889; *The Niagara* v. *Cordes*, 62 U. S. 7 (16 L. ed. pp. 41, 47-50); *Chouteaux* v. *Leach & Co.*, 18 Pa. State Rep. 224; *Bird* v. *Cromwell*, 1 Mo. Rep. 58.

A well considered opinion which elucidates the distinction between a case calling merely for application of the general damage rule, and one in which the rule requiring

mitigation of damage comes into play, was *Seaman* v. *The Crescent City*, Case No. 12,581, 21 Fed. Cases 914. In that case a cargo of flour in barrels had been submerged in water for several hours because of a collision between the carrying vessel and steamer. The flour in its damaged condition could have been taken from the place of collision to Cincinnati, a distance of about 60 miles, where, as the Court found, a ready market existed for flour damaged by water, especially for use in making starch. Instead of doing this, the carrying vessel, acting for the cargo owner, after repairs had been made to her, proceeded with the wet flour to New Orleans where the flour was sold. The cargo owner asked to be made whole for the loss sustained measured by the price obtained at New Orleans. Objection was made, however, to such a recovery by the steamer because the cargo owner could have minimized his loss by sending the damaged flour to Cincinnati, where a higher price could have been obtained. In sustaining this objection, the Court, in a well considered opinion, recognized that the measure of damages which this Court laid down in *Smith* v. *Condry*, *supra*, was the correct general principle but, the Court went on to point out, that this principle is qualified by the equally well-settled doctrine that one whose property has been negligently damaged must take reasonable steps to mitigate damages.

POINT II

In applying the doctrine requiring mitigation of damage, petitioners adduced evidence before the Commissioner, clearly demonstrating that the sunken wheat could have been raised, transported for drying at New York, and sold there as animal feed for a price that would have yielded some $40,000.00 above the expense involved in such a salvage undertaking.

The evidence concerning the statement in this point heading is summarized in the petition at pages 8 and 9. No evidence was offered to contradict this proof. Respondent's witness, Horn, conceded that a feed price could have been obtained. Admittedly, Mr. Horn did not ascertain what the feed price was. He contented himself with opining that salvage would have been a gamble. He failed, however, to point out any *facts* on which this opinion rested, other than the cost of getting the wheat out of the boats and the boats out of the channel, which he estimated at $12,000.00. This estimate was within reasonable bounds, as petitioners' experts agreed. The real question was how much could have been realized for the wheat if it had been dried and sold for animal feed. The evidence adduced by petitioners, which was not challenged in any way, demonstrated that enough could have been realized so that approximately $40,000.00 would have remained after deducting the estimated $12,000.00 expense involved. There was nothing in the record before the Courts below to negative the fact findings of the Commissioner which rest on that evidence.

The argument that the Army Engineers would have obstructed such a salvage attempt is mere sophistry. The fact is, as appears in the opposition brief, at page 4, that

such salvage was not undertaken because in Mr. Horn's judgment, expressed in a telegram to the Army Engineers abandoning the cargo, it would not have been "commercially expedient." But from the very beginning, Mr. Horn decided to consider only "the possibility of arranging for the sale of the damaged wheat, 'as is, where is' in the sunken barges" (Respondent's brief in opposition to the petition at p. 3). No one has ever contended that *wet wheat* commands a price rendering salvage worthwhile; the salvage value of wet wheat, as we demonstrated, is its sale as feed after drying, as any prudent trader knows.

POINT III

The Courts below did not apply the correct standard of judicial review under Admiralty Rule 43½.

The question which the petition raises is whether the Courts below misapprehended the scope of judicial review in reversing the Commissioner's findings. Respondent argues that the District Court's opinion, adopted by the Court of Appeals, was not "clearly erroneous." The fact remains, however, that on testimony which was uncontradicted, and in no way impugned, the Commissioner believed the witnesses produced by petitioners. The Courts below, we submit, departed from the correct standard of review because they were not warranted in rejecting the Commissioner's fact findings on that testimony, for the reasons set forth at pages 5 to 13 of the petition.

Respectfully submitted,

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